

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

SEAN BARNES and CARL DWYER  
individually, and on behalf  
of all others similarly situated,

Plaintiffs,

v.

THE EQUINOX GROUP, INC., and DOES 1-  
100, inclusive,

Defendants.

No. C 10-3586 LB

**ORDER GRANTING PLAINTIFFS'  
MOTIONS FOR FINAL APPROVAL OF  
CLASS ACTION SETTLEMENT,  
AWARDING CLAIMS  
ADMINISTRATION FEES,  
ATTORNEY'S FEES, COSTS, AND  
INCENTIVE AWARDS, AND  
AUTHORIZING ENTRY OF  
JUDGMENT OF DISMISSAL WITH  
PREJUDICE**

[ECF Nos. 159 & 160]

**INTRODUCTION**

All claims but the claim for unreimbursed business expenses settled in a related class action in Los Angeles County superior court, *Evans v. Equinox*, Case No. BC44058. The parties agreed to settle the claim for expense reimbursement in this case. *See* DeSario Decl., ECF No. 160-1, ¶ 12.<sup>1</sup> The court previously granted the unopposed motion for preliminary approval. *See* Order, ECF No. 156. Plaintiffs then moved for final approval and for attorney's fees and costs. ECF Nos. 159, 160. The court held a hearing on August 1, 2013, and grants the unopposed motions. Because the

<sup>1</sup> Citations are to the Electronic Case File ("ECF") with pin cites to the electronically-generated page number at the top of the page.

1 requested amounts are fundamentally fair, adequate and reasonable, the court awards \$50,000 in  
 2 attorney's fees, \$10,000 in litigation costs, \$23,000 in claims administration costs, and a \$5,000  
 3 incentive award each (or \$10,000 total) for the two named plaintiffs.

#### 4 **STATEMENT**

5 Plaintiffs sued Equinox for failing to (1) pay them wages for all hours worked and (2) reimburse  
 6 certain business expenses. *See* Second Amended Complaint, ECF No. 78. The claim settled in this  
 7 class action is about the business expenses, "including music to create workout mixes, heart rate  
 8 monitors, stopwatches, fitness equipment, cell phones and internet plans, and CPR and other fitness  
 9 certifications." DeSario Decl., ECF No. 160-1, ¶ 5. The other claims settled in the related *Evans*  
 10 state class action case for \$5.5. million in a March 15, 2013 final approval that followed discovery  
 11 and a fully-briefed class certification motion in this case and subsequent mediation in both cases.  
 12 *See* DeSario Decl., ECF No. 160-1, ¶ 12. Plaintiffs here joined the *Evans* settlement. *Id.* ¶¶ 12-13.

13 The terms of the expense reimbursement settlement in this case are as follows. *See* Desario  
 14 Declaration Ex. A, ECF No. 160-1 (the "settlement agreement"). The parties agree to certification  
 15 of an "Expense Reimbursement Class," defined as

16 [A]ll persons employed as Personal Trainers in any of Defendant's facilities located in the  
 17 State of California, except those employed at former Sports Club LA locations, specifically  
 18 Equinox Beverly Hills, Equinox Irvine and Equinox West LA during the Class Period  
 (defined as June 1, 2006 through the date that Preliminary Approval is granted).

19 Settlement Agreement § 1.10. The settlement agreement excludes any claims settled in the *Evans*  
 20 case and provides for a total payment of \$150,000 allocated to the following categories: (1) expense  
 21 reimbursement to class members based on the number of personal training sessions they conducted;  
 22 (2) attorney's fees up to one-third of the settlement amount and not to exceed \$50,000 (if approved  
 23 by the court) and litigation costs not to exceed \$10,000; (3) administrative costs of the settlement (as  
 24 administered by the independent claims administrator CPT Group and totaling \$23,000); and (4)  
 25 incentive awards to Plaintiffs of up to \$5,000 each (for a total of \$10,000) if approved by the court.  
 26 Excess funds will be distributed as a *cy pres* award to Bet Tzedek children's advocacy program. *See*  
 27 *id.* §§ 1.14, 3.2.1-2.2, 3.1-3.3. Because the settlement payments are for business expenses, they are  
 28 not subject to any withholding. *Id.* § 8.1. The claims administrator will issue any tax documents

such as 1099 forms to class members, class counsel, and the class representatives. *Id.* § 8.2.

Following the court's preliminary approval and conditional certification of the settlement, *see* 4/18/13 Order, ECF No. 156, Equinox gave CPT Group information that included the 2,182 class members' names, addresses, and the number of training sessions each performed. Morales Decl., ECF No. 160-1, ¶ 5. CPT Group updated the addresses by running them through the National Change of Address database and then mailed the court-approved notice packets to the class members on May 20, 2013. *Id.* ¶¶ 6-7. On June 20, 2013, CPT mailed reminder postcards to the 1,940 class members who had not submitted a claim form or a request for exclusion. *Id.* ¶ 8. CPT Group conducted a skip trace on all returned mail with no forwarding address. *Id.* ¶ 9. They were able to find addresses for and re-mailed notice packets to all but seven class members. *Id.* ¶ 10. As of July 15, 2013, CPT's data had received the following responses:

Category	Number
Total Class Members	2,182
Responses to Class Notice	404
Objections	1
Requests for Exclusion	5
Late Claim Forms	5
Deficient Claim Forms	22
Outstanding Disputes Re: # of Sessions Worked	14
Total Valid Claims	391 (17.92% of Total Class Members)
Total Training Sessions	1,508,403.36
Claimed Training Sessions	643,875.86 (42.69% of Total Training Sessions)
Average Sessions per Claimant	1,646.74
Average Settlement Amount	\$146.53
Largest Single Claim	\$719.02

Morales Decl., ECF No. 160-1 ¶¶ 11-20.

One person named Jerrell Wesley objected to the settlement. Morales Decl., Ex. B to Desario Decl., ECF No. 160-1, ¶ 12; Objections to Class Action Settlement, ECF No. 164. That person also

1 submitted a claim form. Morales Decl., Ex. B to Desario Decl., ECF No. 160-1, ¶ 12 He appeared  
2 at the state court hearing as an objector with someone else named Randall Pittman, who is not a  
3 class member and who has made similar objections (without being a class member) in other class  
4 action settlements (rendering him, in Plaintiffs' view, a vexatious litigant). *See* ECF No. 160-1 at  
5 146; Desario Decl., Exs. D-F; Motion, ECF No. 160 at 17. Wesley objects that the amount of the  
6 settlement is inadequate, the attorney's fees requested are excessive, and the case should either be  
7 stayed in favor of another action in Los Angeles Superior Court or allowed to go to trial. *See*  
8 Objections, ECF No. 164. Neither Wesley nor any other objectors appeared at the August 1, 2013  
9 final fairness hearing.

## 10 ANALYSIS

### 11 I. JURISDICTION

12 This court has jurisdiction under 28 U.S.C. § 1332(c) and (d)(2).

### 13 II. NOTICE

14 The court finds that the notice to the settlement class, as described in the court's earlier order  
15 provisionally approving the class, provided the best practicable notice to the members of the class  
16 (reaching of class members) and satisfied the requirements of due process. As discussed above, the  
17 parties employed CPT Group, Inc., a claims administrator, to oversee the class notification process.  
18 At the preliminary fairness hearing, counsel explained that CPT Group administered the related  
19 *Evans* settlement. It mailed notices and reminder postcards to the class members, performed skip  
20 traces on all return mail, and worked with claimants to resolve disputes regarding deficiencies in  
21 claims and disputes about the number of sessions that individual class members' worked. The court  
22 finds that these procedures were adequate.

### 23 III. CLASS CERTIFICATION

24 For the reasons and under the standards set forth in the court's April 18 order, the court finds that  
25 the proposed settlement class here still meets the requirements of Federal Rule of Civil Procedure  
26 23(a) and (b). The court certifies the class members set forth above solely for the purpose of entering  
27 a settlement in this matter.  
28

**IV. FINAL APPROVAL OF SETTLEMENT AGREEMENT**

A court may approve a proposed class action settlement of a certified class only “after a hearing and on finding that it is fair, reasonable, and adequate.” Fed. R. Civ. P. 23(e)(2). In reviewing the proposed settlement, the court need not address whether the settlement is ideal or the best outcome, but determines only whether the settlement is fair, free of collusion, and consistent with Plaintiff’s fiduciary obligations to the class. *See Hanlon v. Chrysler Corp.*, 150 F.3d at 1027. The *Hanlon* court identified factors relevant to assessing a settlement proposal: (1) the strength of the plaintiff’s case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceeding; (6) the experience and views of counsel; (7) the presence of a government participant; and (8) the reaction of class members to the proposed settlement. *Id.* at 1026 (citation omitted).

The court evaluated the proposed settlement agreement for overall fairness under the *Hanlon* factors and concludes that preliminary settlement is appropriate. First, the strength and relative relation of this case to the state case militate in favor of settlement. Second, litigation poses risks, and this litigation (as the docket sheet reveals) has been expensive and protracted (and complicated given the interplay with the related state class action). Given the risk of protracted appeals, this factor favors settlement. Third, the amount offered in settlement appears sufficient to cover the expenses at issue in this litigation given the risks identified. The settlement fund has been allocated to the class members based on the number of personal training sessions each class member taught during the class period. Settlement Agreement § 3.4. The net settlement amount results in an average award of around \$140. This seems reasonable in light of the defenses and appellate risks that experienced counsel have identified. *See* Motion at 13. The monetary value of this portion of the case is relatively low compared to the rest of the case (which settled in state court for a fund of \$5.5 million). Also, the settlement is the product of serious, non-collusive, arms’ length negotiations by experienced counsel with the assistance of a private mediator.

The extent of discovery and stage of proceedings also support the settlement agreement. Before mediation, the parties engaged in extensive discovery over several years. *See generally* Docket.

1 The class counsel propounded discovery, deposed Equinox's 30(b)(6) witness, interviewed and  
2 obtained statements from scores of class members, inspected several Equinox locations and  
3 defended numerous class members' depositions. DeSario Decl., ECF No. 160-1, ¶ 9. In addition,  
4 Plaintiffs had already filed their class certification motion when the *Evans* case settled.

5 Finally, the reaction of class members to the proposed settlement also favors approval. While  
6 fewer than 18% of the class members submitted claim forms, these represent over 42% of the total  
7 training sessions.

8 In addition, only one class member objected to the settlement. *See* Objections to Class Action  
9 Settlement, ECF No. 164. Mr. Wesley claims generally that the settlement fund is inadequate as  
10 compensation or deterrence. *Id.* But he fails to explain why that is so. *Id.* He contends the  
11 attorney's fees requested are excessive because the settlement fund is purportedly inadequate. *Id.* at  
12 3. But the court rejects the underlying premise of that argument. He also argues that the case should  
13 be stayed in favor of another action "to avoid duplicative litigation." *Id.* at 2. But settling this case  
14 better achieves that end. Finally, he contends that the case should be allowed to go to trial to  
15 prevent a coupon settlement. *Id.* at 3. The settlement agreement does not provide for a coupon  
16 settlement. In sum, the court overrules his objections.

17 In addition, Mr. Welsey is just one of 2,182 class members, and only five members requested  
18 exclusion. The nature of the expenses (*see supra*) – when compared to the other settled claims in the  
19 *Evans* case – gives context to this result, particularly considering the success rate in identifying  
20 current contact information for class members.

21 In sum, the court finds that viewed as a whole, the proposed settlement is sufficiently "fair,  
22 adequate, and reasonable" such that approval of the settlement is warranted.

## 23 **V. COMPLIANCE WITH CLASS ACTION FAIRNESS ACT**

24 The record establishes that counsel served the required notices under the Class Action Fairness  
25 Act of 2005, 28 U.S.C. § 1715, with the documentation required by 28 U.S.C. § 1715(b)(1-8). *See*  
26 DeSario Decl. Ex. K, ECF No. 160-1 at 256-364.

## VI. ATTORNEY'S FEES

### A. Legal Standard

Rule 23(h) of the Federal Rules of Civil Procedure provides, "In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Attorney's fees provisions included in proposed class action agreements must be "fundamentally fair, adequate and reasonable." *Staton*, 327 F.3d at 964.

In "common fund cases," a court has discretion to award attorney's fees either as a percentage of such common fund or by using the lodestar method. *Id.* at 967-968. In a common fund case, a lodestar method does not necessarily achieve the stated purposes of proportionality, predictability and protection of the class and can encouraged unjustified work and protracting the litigation. *See In re Activision Securities Litigation*, 723 F. Supp. 1373, 1378 (N.D. Cal. 1989). Additionally, the percentage-of-the-fund method is appropriate where – as here – the amount of the settlement is fixed without any reversionary payment to the defendant. *See Chu v. Wells Fargo Investments, LLC*, Nos. C 05-4526 MHP, C 06-7924 MHP, 2011 WL 672645, at \*4 (N.D. Cal. Feb. 16, 2011). In the Ninth Circuit, the "benchmark" for attorney's fees in common fund class actions is 25% of the common fund. *Staton*, 327 F.3d at 968. "The benchmark percentage should be adjusted . . . when special circumstances indicate that the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors." *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990); *see also Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048 (9th Cir. 2002) (explaining that the rate ultimately selected must be supported by findings that take into account all of the circumstances of the case).

### B. Attorney's fees

Class counsel seeks one-third of the gross settlement fund as award of attorney's fees. Motion for Attorneys' Fees and Costs ("Fees Motion"), ECF No. 159 at 10. Courts in the Ninth Circuit look to the following factors when determining what a proper percentage is for an award of attorney's fees: (1) the results achieved; (2) the risks of litigation; (3) whether there are benefits to the class beyond the immediate generation of a cash fund; (4) whether the percentage rate is above or below the market rate; (5) the contingent nature of the representation and the opportunity cost of bringing



1 the suit; (6) reactions from the class; and (7) a lodestar cross-check. *Vizcaino*, 290 F.3d at 1048-52.

2 Applying these factors, the court finds an award of 33% is warranted in this case. Given the  
3 interplay with the *Evans* case, the results achieved are fair. Counsel assumed substantial risk,  
4 litigated risk on a contingent basis, and are receiving fees that are fair considering those factors. The  
5 percentage rate is appropriate given the small figures at stake. *See* Fees Motion at 13-14 (collecting  
6 cases); *Cicero v. DirecTV, Inc.*, No. EDCV 07-1182, 2010 WL 2991486, at \*6 (C.D. Cal. Jul. 27,  
7 2010) (collecting cases). The class reaction supports the award. So does the lodestar cross-check.  
8 The hourly rates (\$425 for attorney Molly DeSario; \$525 for attorney Matthew Bainer; and \$650 for  
9 attorney Scott Cole, *see* DeSario Decl. Ex. B, ECF No. 159-1 at 88) are reasonable given counsels'  
10 qualifications. *See* DeSario Decl., ECF No. 159-1, ¶¶ 16-20; *id.* Ex. D. They billed 1,756 hours for  
11 a lodestar amount of \$849,370.00. *See* DeSario Decl. Ex. B, ECF No. 159-1 at 88.

## 12 **VII. LITIGATION COSTS**

13 Class counsel are entitled to reimbursement of reasonable out-of-pocket expenses. Fed. R. Civ.  
14 P. 23(h); *see Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (holding that attorneys may  
15 recover reasonable expenses that would typically be billed to paying clients in non-contingency  
16 matters.); *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995) (approving  
17 reasonable costs in class action settlement). Class counsel seeks reimbursement of \$10,000 in  
18 litigation expenses, which is the maximum allowed under the settlement agreement. *See* Fees  
19 Motion, ECF No. 159 at 15. Class counsel submitted detailed records showing that they incurred  
20 \$47,563.12 in costs. DeSario Decl. Ex. C, ECF No. 159-1 at 90-92. The submissions support an  
21 award of compensable costs of \$10,000.00.

## 22 **VIII. INCENTIVE AWARDS**

23 The district court must evaluate named plaintiffs' awards individually, using relevant factors  
24 including "the actions the plaintiff has taken to protect the interests of the class, the degree to which  
25 the class has benefitted from those actions, . . . [and] the amount of time and effort the plaintiff  
26 expended in pursuing the litigation." *Staton*, 327 F.3d at 977. "Such awards are discretionary . . .  
27 and are intended to compensate class representatives for work done on behalf of the class, to make  
28 up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize



1 their willingness to act as a private attorney general.” *Rodriguez v. West Publishing Corp.*, 563 F.3d  
2 948, 958-959 (9th Cir. 2009). The Ninth Circuit recently emphasized that district courts must  
3 “scrutiniz[e] all incentive awards to determine whether they destroy the adequacy of the class  
4 representatives.” *Radcliffe v. Experian Info. Solutions*, 715 F.3d 1157, 1163 (9th Cir. 2013).

5 This case posed complicated issues with an interplay in a related case and protected litigation  
6 and mediation. Under all the circumstances, including the collective outcome, the court approves  
7 the incentive awards.

### 8 CONCLUSION

9 The court approves the settlement in the total amount of \$150,000 and awards \$50,000 in  
10 attorney’s fees, \$10,000 in litigation costs, \$23,000 in claims administration costs, and \$5,000 as an  
11 incentive award to each named plaintiff for a total of \$10,000. This disposes of ECF Nos. 159 at  
12 160.

13 **IT IS SO ORDERED.**

14 Dated: August 1, 2013



15 LAUREL BEELER  
16 United States Magistrate Judge  
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